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SUPREME COURT, U.S.

No. 98-154

In The

Supreme Court of the United States

October Term, 1997

PENNY MOORE,

Petitioner,

vs.

JOHNSON CITY BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case is fact intensive. In the interest of brevity, the Respondents submit the following timeline of significant events:[1]

- November 19, 1993 — Petitioner Moore deceptively acquires a few days of "approved" sick leave claiming a need for emergency "blood work." [App. Vol. III, p. 641]. Moore's treating psychiatrist later verified "blood work" was not a concern. [App. Vol. V, pp. 1043-1044].

- November 23, 1993 — Moore is involved in a drunken, mid- school day multiple car accident that attracts both newspaper and television coverage. [App. Vol. III, pp. 451-454, 1036-1038]. Moore is "uncommunicative . . . verbally abusive, uncooperative [and then] passes out, blacked out." [App. Vol. III, pp. 448-450]. From the emergency room she is transported to Woodridge Psychiatric Hospital. [App. Vol. V, pp. 1175-1176].

- November 23, 1993 to January 5, 1994 — Other than to endorse her paid suspension payroll checks, Moore is silent to the written request of Superintendent Simmons to "[P]lease provide to us the report from Woodridge indicating your ability to function in your teaching position." [App. p. 675, Pl.'s Ex. 4].

- January 5, 1994 — Moore is moved to a "suspension without pay" status. [App. p. 676, Pl.'s Ex. 5] Her

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1. All references are to the Joint Appendix "[App. __]", and, if an exhibit, to the Joint Appendix page number where the exhibit begins followed by either "[Pl.'s Ex.__]" or "[Def.'s Ex.__]".

Tennessee Education Association [T.E.A.] attorney promptly demands that she be returned to the classroom, promising a letter from her treating psychiatrist, Dr. Janet Lewis, addressing concerns about Moore's ability to assume responsibility for a classroom of seven (7) year old second grade students. [App. Vol. IV, p. 677, Pl.'s Ex. 68, App. Vol. III, p. 442].

- January 5, 1994 to January 25, 1994 — Petitioner Moore is non-compliant with Alcoholics Anonymous, Narcotics Anonymous and group therapy rehabilitation efforts — showing up on occasion under the influence, acknowledging continued marijuana use and "demonstrating inadequate commitment to remain sober." [App. Vol. V, pp. 1057-1061, 1068-1069, 1078, Def. Ex. 54, App. Vol. V, pp. 1175-1178].

- January 26, 1994 — Petitioner Moore is involuntarily committed to Woodridge Psychiatric Hospital by Dr. Lewis due to suicidal projections; detoxification from continued drug abuse is, again, attempted. [App. Vol. V, p. 1177]. Because she was "verbally aggressive and threatening and attempting to hit the staff" Moore was placed in a four point restraint. [App. Vol. V, pp. 1066-67]. Moore's treating psychiatrist writes a T.E.A. representative indicating she cannot write the requested letter to the school system ". . . because positive responses to the questions . . . posed would be misrepresenting Penny's clinical situation. I am unlikely to be useful to you in Penny's appeal of her suspension [from the school system]." [App. Vol. V, pp. 1068-1072].

- February 7, 1994 — Petitioner Moore reports to group therapy "under the influence of some chemical" [App. Vol. V, p. 1196; App. Vol. V, pp. 1062, 1077].

- February 11, 1994 — Moore "got drunk after her court custody hearing." [App. Vol. V, p. 1205]. During this hearing Moore's treating psychiatrist testified before the juvenile court that Moore was incapable of providing care nor capable of custody of her seven (7) year old second grade daughter or her youngest daughter, "a babe in arms." [App. Vol. V, pp. 1083-84; App. Vol. II, p. 427-428].

- March 6, 1994 — Moore appeared in State court on her D.U.I. charge stemming from the November 23, 1993 accident. She was intoxicated and the case was postponed. [App. Vol. V, p. 1063; Def.'s Ex. p. 1197].

- March 10, 1994 — Moore admitted to her therapist she was having "racing thoughts" and was coping by drinking and "smoking dope". [App. Vol. V, pp. 1197-1198].

- April 14, 1994 — Moore was again involuntarily committed to Woodridge Psychiatric Hospital for detoxification efforts following her inability to remain drug free. [App. Vol. V, pp. 1079]. This admission occurred when Moore "attempted to discontinue drug use on her own and was feeling quite sick" and indicated she intended to commit suicide by overdosing on drugs. [App. Vol. V, p. 1078]. Moore became combative in the hospital lobby [App. Vol. V, p. 1079] was a danger to herself and others, [App. Vol. V, p. 1207] was physically placed in a special five-point restraint bed simply to control her violent behavior, [App. Vol. V, p. 1080] and had marks on her body consistent with IV drug use. [App. Vol. V, pp. 1081, 1180, 1208].

- April 26, 1994 — Moore appeared for her hearing with Dr. Simmons and testified she was not using illegal substances [App. Vol. I, p. 195, R. 69, pp. 11-12], "did not know why she was enrolled by Dr. Lewis in Narcotics Anonymous" [App. Vol. IV, p. 925, Pl.'s Ex. 37] and when asked if she had requested any type of job "modification" or "adjustment", responded, "No, because I didn't need it." [App. Vol. IV, p. 913, Pl.'s Exhibit 37]. Moore consistently maintained that her hospitalization and psychiatric conditions were simply "not pertinent to my ability to teach." [App. Vol. IV, p. 919, Pl.'s Ex. 37]. With consistency, Moore denied under oath during her deposition that she had used illegal drugs except "experimentation as a kid in school" and "just for a short time recently." [App. Vol. III, pp. 438-443]. [Moore elected not to take the witness stand at trial to refute the overwhelming evidence of her illicit drug abuse].

- May 13, 1994 — Superintendent Simmons informs Moore that her termination will occur but provides a final opportunity for reconsideration if she will provide "information with which [Moore's] ability to resume her teaching duties can be considered." [App. Vol. IV, p. 687, Pl.'s Ex. 14]. No information is provided and "at some point her termination became final" [App. Vol. I, p. 195, R. 69, p. 8].

- May 25, 1994 — Moore is arrested for public intoxication and disorderly conduct when her group therapist found it necessary to call the police to Woodridge Hospital [App. Vol. II, pp. 308-309]. The arresting officer described Moore as unruly, agitated and combative [App. Vol. II, pp. 310-311, Def.'s Ex. 45, p. 1000].

- May 25, 1994 to February, 1996 — Moore's medical and psychiatric records reflect dismal failures to remain drug free until, in February 1995, her first sincere efforts began to remain drug free. [App. Vol. VI, pp. 1242, 1265, 1337, Def.'s Ex. 52, 55, 57]. At the time of trial (February, 1996) Moore had not regained full, unsupervised custody of her children, but hope was expressed that she would soon be capable. [App. Vol. II, pp. 425-505].

A. The Petition misrepresents the nature of Moore's "approved" leave of absence.

In furtherance of the efforts to minimize the school day conduct of Moore, the Petition characterizes Moore as being on "approved medical leave" that had been "obtained [with] permission from her principal." [Petition, pp. 3-4]. Omitted is the undisputed evidence that the "approved" leave was deceptively procured. The record reflects that on November 19, 1993, a Friday, Moore informed her principal she needed, as an emergency, to go to the hospital to have "blood work" done. [App. Vol. III, p. 641]. Approval was understandably given since the principal was led to believe Ms. Moore was checking into the hospital "as a matter of life or death, that very afternoon." [App. Vol. III, pp. 641-642].

Dr. Janet Lewis, Moore's treating psychiatrist, testified there was no concern about "blood work" or a need to check into the hospital for that purpose. [App. Vol. V, pp. 1043-1044]. In actuality, Moore was being professionally encouraged to check into a psychiatric institution to de-toxify from an illicit drug addiction which included intravenous morphine use, cocaine, xanax, marijuana, opium, Demerol, methadone and alcohol. [App. Vol. VI, pp. 1337-1338; App. Vol. III, pp. 465-467; App. Vol. V, pp. 1025, 1028, 1203]. In short, the record is

clear that the leave time obtained by Moore was deceptively acquired — this being the first in a long series of deceptions, half-truths and false statements made by Moore and her representatives.

B. The Petition misrepresents the magnitude of the automobile accident in which the Petitioner was involved and her conduct while on "approved" leave.

Understandably without embellishment, the Petitioner admits she caused an early afternoon school day automobile accident, but seeks to discount the event by claiming "[t]here were no injuries in the accident, and the damage to the vehicles was minor." [Petition, p. 3].

Driving double drunk [.20 blood alcohol content] at 1:45 p.m., [App. Vol. V, pp. 1044-1045] Moore caused a rather spectacular multi-car accident at a busy intersection within the corporate limits of Johnson City. [App. Vol. III, pp. 451-452]. As the investigating police officer testified, Moore ". . . was uncommunicative . . . verbally abusive, uncooperative and not responding to questions . . . [she then] passed out, blackened out." [App. Vol. III, p. 450]. The accident was caused by Petitioner Moore

> . . . passing through an intersection [turning] left over a concrete median into east-bound . . . traffic, made a U-turn, went off the roadway, crossed a sidewalk, struck and knocked down a metal street light, re-entered the roadway eastbound, re-entered the intersection, missed or did not turn right in the southbound lanes but cut across a concrete median in a northbound lane . . . struck a stopped pick-up truck . . . knocked it to the side and then struck head on a nine-passenger van.

[App. Vol. III, p. 451, Def.'s Ex. 43].

The attempt by the Petitioner to minimize this school-day conduct apparently stems from a recognition that simply because Moore's conduct was due to her disability, the law does not excuse or require her employer to ignore such conduct. *See, e.g., Williams v. Widnall,* 79 F.3d 1003 (10th Cir. 1996) (Alcoholics and drug addicts not protected from consequences of misconduct).

C. The Petition misrepresents the submitted testimony directed to Moore's capacity to function as an elementary school teacher.

In furtherance of the assertions that Moore was disabled, but otherwise qualified to perform her duties as an elementary school teacher[2], the Petitioner represents that "[t]here is no evidence from which it could be concluded that Moore could not have performed her job duties with . . . success when she was not hospitalized" and "[she] was capable of functioning effectively as a teacher upon her release from the hospital." [Petition, pp. 4, 5, 8]. Disregarding for the moment that Petitioner's statements improperly seek to reallocate the burden of proof from establishing Moore *was* qualified, the record is nevertheless replete with evidence that Moore was *not* qualified to teach.

Even assuming *arguendo* it is true that a detoxified Moore could teach immediately following her hospitalizations, the critical question remains: "For how long before returning to substance abuse?" Moore's psychiatric records, at times, reflect only hours, not days. [App. Vol. V, pp. 1051-1053, 1056, 1085]. That Moore had not overcome her drug and alcohol addictions

2. *See* Elementary School Teacher Job Description, App. Vol. IV, pp. 691-692; presentation skills, instructs, demonstrates, prepares, maintains order, counsels, discusses, communicates, observes, represents, reports, etc.

or her psychiatric difficulties at the time of discharge is undisputed. [App. Vol. V, pp. 1069-1091; 1093-1094; App. Vol. VI, pp. 1242, 1265, 1337]. Moreover, Petitioner's attempts to claim an ability to teach during the gaps between hospitalizations for detoxification is disingenuous. Is it not obvious what Moore was doing during the hospital interims to bring about a need for professionally supervised drug withdrawal? The reason Moore was hospitalized in the first place, both voluntarily and involuntarily, was to assess and treat her psychiatric symptoms "while she was sober" [App. Vol. V, p. 1037]. While Moore's medical and psychiatric records are filled with her tragic failures to remain drug free, this tragedy would have only been compounded had the lives of a classroom of impressionable second graders also been implicated and impacted. [App. Vol. V, pp. 1084-1087]. As Moore's treating psychiatrist put it "teach while under the influence of morphine? It's best not to. It can impair judgment." [App. Vol. V, pp. 1082-1083].

Prior to and long after her termination from employment, Moore carried the diagnosis of "dissociative disorder" which is "a disruption in normal functioning of consciousness and memory and identity . . . ". [App. Vol. V, p. 1017]. Moore reported to her psychiatrist she was disassociating, that this had occurred at school and people were noticing. [App. Vol. V, p. 1019]. Moore also had "alternate personality states" [App. Vol. V, p. 1018] resulting in "a pattern of instability in [her] mood and in [her] relationships and . . . sense of identity." [App. Vol. V, pp. 1022-1023]. Moore's alter personalities included two (2) that were children and one (1) violent alter which was referred to as "Kate" when being discussed by Moore and her therapist. [App., Vol. V, p. 1034, 1035]. Moore also had a mood disorder "characterized predominantly by . . . depressed mood, sleep and appetite disturbances and suicidal episodes." [App. Vol. V, pp. 1022, 1034]. And perhaps of most importance to

this case, Moore had a diagnosis of "mixed substance dependence" resulting in a "maladaptive pattern of use of alcohol and illicit drugs and experienced tolerance and withdrawal symptoms and craving." [App. Vol. V, p. 1023].

Moore's history and level of drug use remained sketchy even to the professionals attempting to treat her [App. Vol. V, pp. 1028-1029] until she finally fully disclosed it during an institutional commitment at D.R.I. Institute: intravenous morphine, two or three times per day, for four years; cocaine, two or three times per month, for one year; Opium, four or five times during a six month period; Demerol, two times during the past year; xanax, up to thirty per day, for one year, Methadone, two times per week, for two years; alcohol, a fifth daily, for fourteen years. [App. Vol. V, pp. 1025, 1028, 1203]. The D.R.I. confinement was from August 25, 1994 through September 12, 1994 so it is evident that Moore was consumed with a drug and alcohol addiction and the concomitant behavioral characteristics throughout her suspension from the Johnson City school system. [App. Vol. V, pp. 1025, 1027]. That Moore was "shooting" morphine during the time of her suspension and termination is also confirmed by nursing notes reflecting red marks on her arms and legs consistent with IV drug use. [App. Vol. V, p. 1030].

Petitioner's contention that there was no evidence of Moore's inability to teach is not supported by the record below. Besides, what is actually missing is any credible evidence that Moore *was* qualified to teach. That the Petitioner before this court was either unable or unwilling to even take the witness stand at her own trial should serve as the initial indicator to this Court why the Petitioner failed to carry her burden of proof in this case. [App. Vol. III, p. 437]. Despite Petitioner's contention that Moore's drug abuse is irrelevant because her employer was unaware of the extent and severity of the problem, the Petitioner must still establish that Moore was otherwise qualified to perform the essential functions of a classroom teacher.

D. The Petition misrepresents the nature of the request of Superintendent Simmons for information pertaining to Moore's medical and psychiatric condition.

The Petition represents that Superintendent Simmons sought a release for "all of [Moore's] medical and psychiatric records." [Petition p. 5]. The word "all" does not appear in any of the three (3) communications from Superintendent Simmons to Moore. [App. Vol. IV, p. 675; p. 676; pp. 686-687]. That this issue is lawyer driven is highlighted by the fact that Moore, during her pretermination hearing, testified she was not under the impression that she was required to submit any medical records, only that it had been suggested. [App. Vol. IV, pp. 920-921]. This was why, as the trial court noted, Superintendent Simmons provided a final opportunity for Moore to provide "information . . . with which [your] ability to resume [your] teaching duties can be considered." [App. Vol. IV, pp. 686-687; R. 69, p. 8].

Petitioner's focus on the nature and extent of the school system's request for a professional opinion regarding Moore's ability to resume teaching is a diversionary tactic to avoid the more important issue of Moore's non-disclosure of her disability. Both common sense and emerging law indicate that an employee cannot leave an employer to guess at what employment decisions should be made and afterwards complain of discrimination and lack of accommodation for a disability that remained secret until after the adverse employment action was taken. *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996); *Grenier v. Cyanmid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995); *Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 200 (7th Cir. 1995). The lower courts generally accept the published A.D.A. regulations for the proposition that an employee must interact and has a responsibility to "identify the precise limitations resulting from the disability and potential

reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2 (30)(3) 1995; *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996).

A direct review of the three (3) letters sent by Superintendent Simmons to Moore is encouraged as it is evident from those letters that the school system sought only some professional evaluation of Moore's condition. That the request was appropriate is reflected in the following opinions: *Scheideman v. West Des Moines Community School Dist.*, 898 F.2d 286 (8th Cir. 1993); *Strong v. Union Dale Union Free School Dist.*, 902 F.2d 208 (2nd Cir. 1990); *Brown v. Houston Independent School Dist.*, 763 F. Supp. 905 (S.D. Tex. 1991).

E. The Petition inaccurately states that it was the District Court's opinion that Moore was discriminated against by being asked to produce more evidence of her competence to return to work than would have been required of a teacher with a non-psychiatric medical problem.

While it is true the trial judge found that Moore was asked to provide information not generally sought from employees seeking to return to work following a physical injury, it is certainly stretching the trial court opinion beyond the breaking point to state, as the Petitioner has, that the District Court found Moore was "discriminated against." [Petition p. 6; App. Vol. I, p. 195, R. 69 pp. 10-11].

As Judge Thomas Hull pointed out, "[Superintendent] Simmons' initial letter of November 23, 1993 [and presumably as repeated in the 'final opportunity' correspondence of May 13, 1994] appears to have been appropriate to the circumstances and falls under the 'necessity exception' to the ADA [i.e., 42 U.S.C. § 12112(d) (4) (A)]." [App. Vol. I, p. 195, R. 69, pp. 9-11]. Petitioner's conversion of *dicta* to a holding of the trial

court without acknowledging the *dicta* that neutralizes any such holding is little more than an attempt to bootstrap this case to a narrower issue. The trial court simply disposed of Petitioner's ADA claim at its earliest analytical stage, i.e., "[b]ecause . . . Moore has not proven that she was otherwise qualified, . . . [t]his part of her claim will be dismissed." [App. Vol. I, p. 195, R. 69, p. 12]. The Sixth Circuit did not find Petitioner's argument of "discrimination" persuasive either. *Moore v. Johnson City Bd. of Educ.*, 134 F.3d 781 (6th Cir. 1998). And clearly the circumstance of Moore's multiple hospitalizations and "hint of a drug abuse problem" justified the request for a professional opinion from her treating psychiatrist. 42 U.S.C. § 12112(d)(4)(A). [App. Vol. I, p. 195, R. 69, pp. 11-12].

REASONS FOR DENYING THE WRIT

I.

THE AMERICANS WITH DISABILITIES ACT QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI IS NOT PRESENT IN THE RECORD IN THIS CASE.

A. Neither court below held that post-termination evidence of Moore's continuing disability was dispositive or necessary to the finding that Moore had failed to establish she was disabled but otherwise qualified to teach second grade.

Implicit in Section I, pp. 11-13 of Petitioner's brief is a recognition that there is evidence in the record regarding Moore's substance abuse and psychiatric disorders that pre-date her discharge. [Petition pp. 11, 12]. Equally evident are Petitioner's efforts to cleanse the record to present the desired issue that the lower courts only considered evidence of Moore's disability *after* termination instead of at the time of the adverse

employment action. Instead of there being "no evidence" of pre-termination disability the Petitioner actually urges that the evidence is of "no relevance" [Petition, p. 12] or "isolated [and therefore insufficient]" [Petition, p. 11]. This argument is nothing more than Moore's disagreement with the weight attributed to the evidence by the courts below. The Petitioner's argument is also a tacit admission that the record in this case is fact intensive and therefore does not clearly present the issue she now submits: i.e., "at what point in time is an employee's disability to be determined?"

While the issue posited by the Petitioner is an interesting one, the facts of this case simply do not contain it. Contrary to Petitioner's speculation that the District and Circuit courts evaluated Moore's ability to function as a teacher with information pertinent only to her life *after* her termination does not withstand even minimal scrutiny. The record is replete with Moore's psychiatric and involuntary hospital admission records covering the span of time from long before her initial suspension with pay to long after the date of her hearing before Dr. Simmons. [App. Vol. VI, pp. 1245-1356; Vol. V, pp. 1011-1094, 1172-1230]. That the record contains post-termination evidence of disability serves to establish only the severity of Moore's dysfunctional existence.

This case does not contain the issue of post-termination disability evidence the Petitioner wishes it did and, for that reason, the Petition should be declined.

II.

PETITIONER'S PRETERMINATION HEARING, CONDUCTED IN ACCORD WITH TENNESSEE'S "EDUCATION IMPROVEMENT ACT"[3], DID NOT OFFEND THE PROCEDURAL DUE PROCESS DECISIONS OF THIS COURT.

This Court has consistently and repeatedly held that property interests are not created by the Constitution, but rather are created and defined by "existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). There is no question that Tennessee's "Education Improvement Act" and Moore's single year 1993/94 employment contract created her entitlements. [App. Vol. I, p. 195, R. 69, p. 13]. Since Moore was not a tenured teacher, the extent of Moore's property right was the value of the balance of her 1993/94 teaching contract — approximately five (5) month's salary[4]. It is also undisputed that Tennessee's "Education Improvement Act" defined the procedure by which Moore's property right could be extinguished. Tenn. Code Ann. § 49-2-301(F)(33). And there has never been a contention that the "Education Improvement Act" was not followed. Because of this, the Respondents have long contended that Moore is

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3. In 1991 the Tennessee Legislature passed a comprehensive series of statutes known as the "Education Improvement Act." The provision relevant to this case is Tenn. Code Ann. § 49-2-301(F)(33).

4. It was stipulated by the Defendants at trial that Moore's stake in the due process question was $15,292.50. On reflection, it is substantially lower since Moore's suspension without pay was appropriate. *FDIC v. Mallen*, 486, U.S. 230, 240-241, 108 S. Ct. 1780, 1787, 1788, 100 L. Ed. 2d 265 (1988), *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

silently attacking the constitutionality of a state statute without compliance with Rule 24(c) of the Fed. R. Civ. P. or, now, Rule 29(c) of this Court.

Petitioner's premise that a "simple right-of-reply hearing" [Petition, p. 14] was provided Moore by the Johnson City School System is erroneous. By definition, a right-of-reply hearing is "very limited" and "should be an initial check against mistaken decisions — essentially, a determination whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action."[5] *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 545-546, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985); *Gilbert v. Homar*, 520 U.S. __, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997).

If nothing other than the fanfare of correspondence from Moore's attorney is reviewed, it becomes clear that something more than a "right-of-reply" proceeding was taking place. [App. Vol. I, pp. 22, 23, 24, 30, 31]. A court-reporter produced 185 page[6] transcription of the hearing allows this Court a complete review of the due process provided Moore and leads to the inevitable conclusion that Moore was provided an opportunity to secure able counsel, prepare her side of the story and present a response and defense to the written charges of which she had been notified. [App. Vol. IV, pp. 753-935, Pl.'s Ex. 37]. That Moore was provided a meaningful opportunity to invoke Superintendent Simmons' discretion *prior* to the termination decision is evident from the recorded hearing and satisfies the core requirements of Fourteenth Amendment procedural due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.

5. Had Moore surfaced in response to Simmons' request prior to being suspended without pay on 1-5-94, she could have received a right-of-reply hearing prior to that action.

6. A nearly equal volume of exhibits were also submitted.

Ct. 1148, 71 L. Ed. 2d 265, (1982); *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1139 (6th Cir. 1992).

This Court has long instructed that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Restaurant Workers v. McElroy,* 367 U.S. 886 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961); *See also Morrisey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972) ("Due process is flexible . . . [to] the particular situation"). While Respondents acknowledge that the existence of state judicial remedies is a relevant factor in an abstract analysis of the fluid concept of "due process," they do not concede that the existence or lack of existence of state judicial remedies is dispositive of the due process issue in this case. In other words, Moore received ample due process without consideration of whether or not state judicial remedies were available to her. As will be shown, that state judicial remedies *were* available to Moore is simply icing on the cake.

The cases relied on by Moore for the proposition that there was no avenue from her hearing with Superintendent Simmons to the local courthouse is unsupportable. [Petition, p. 15]. On the contrary, even a cursory review of Tennessee teacher litigation establishes the ease with which Moore could have pursued such review, had she desired. *See, e.g., Cooper v. Williamson Co. Bd. of Educ.,* 803 S.W. 2d 200 (Tenn. 1990), *cert. denied,* 59 U.S. 3769, 111 S. Ct. 2013, 114 L. Ed. 2d 100 (1991), *Malone v. Shelby Co. Bd. of Educ.*, 773 S.W. 2d 256 (Tenn. Ct. App. 1989) and *Howard v. Bogart,* 575 S.W. 2d 281 (Tenn. 1979). *See also* multiple pages of teacher discharge litigation following Tenn. Code Ann. § 49-5-101, *et seq., Personnel. Also* Tenn. Code Ann. § 49-5-409 (Supp. 1994) provides a remedy for the breach of a fixed term contract such as Moore's.

Petitioner's flagship case, *Sutton v. Cleveland Board of Education*, 958 F.2d 1139 (6th Cir. 1992) is inapposite. In *Sutton,* the plaintiffs sought to trigger state judicial review, thereby establishing its unavailability. Moore having never made the attempt, can make no such showing. Besides, the local Chancery Court would have accepted jurisdiction of Moore's grievance.

Petitioner's complaint that Superintendent Simmons was not made available as a witness is nothing more than legal posturing. No objection to Superintendent Simmons fulfilling his statutorily imposed duty was made when Moore's hearing was initially scheduled. [App. Vol. IV, p. 683, Pl.'s Ex. 12]. Only as the hearing date drew near did Moore's representatives attempt to force the school system into a Hopson's choice: "we wish to call Simmons as a witness, therefore he can't serve in the capacity mandated by state statute and, if he doesn't, the state statute will not be followed." *Id.* Petitioner's pre-termination hearing counsel never identified any basis for his unilateral designation of Dr. Simmons as a witness and talented trial counsel was unsuccessful during his cross-examination of Simmons in identifying any need other than the obvious purpose i.e., T.E.A. contrariness. [App. Vol. III, pp. 540-599]. The trial judge recognized the grand-standing efforts for what they were, stating "[Simmons] read a chronology of events and the reasons he had initiated dismissal proceedings." [App. Vol. I, p. 195, R. 69, p. 6].

Petitioner's complaint that she did not receive sufficient due process does not warrant review by this Court.

CONCLUSION

Petitioner's hypothetical example converting Moore to a physically disabled quadriplegic is both apropos and useful in

highlighting the flaws in Petitioner's basic logic and initial premise in this appeal. The non-hypothetical drug-impaired Moore skips the same issue for herself as she so easily suggests should be skipped for the hypothetical, quadriplegic Moore. The Petitioner correctly points out: "*If* Moore could, however, effectively provide classroom instruction, her quadriplegia would not of necessity render her unqualified to teach." [Petition, p. 13]. That is a big "*if*" — both for a hypothetical quadriplegic Moore and the real Moore. As the Petition itself recognizes, "Penny Moore suffered from horrible and sometimes unimaginable psychiatric disorders." [Petition, p. 13]. While recognizing and agreeing that Moore's mental, emotional and drug-saturated capacity was the functional equivalent of quadriplegia, these Respondents, in the Spring of 1994, were called upon, as were the courts below, to determine if Moore could be placed in a classroom with seven (7) year old children and perform the essential functions of the job. A review of Moore's hospital records clearly reflects she could not.

An unspoken theme in the Petition before this Court is that the Johnson City School System had no business attempting to delve into the private, out-side-of-school, life of Moore. Elementary school teachers, however, serve a unique role in our society. That the school system is sensitive to that role should be applauded, not condemned. For example, Petitioner Moore reported to her psychiatrist that she was frightened of her supplier of illegal drugs. [App. Vol. V, p. 1032]. Is it not a legitimate concern to wonder if Moore was frightened enough of her drug dealer for her to allow him access to an elementary school campus for the purpose of hawking his wares?

This Court does not usually undertake to review the concurrent findings of two lower federal courts. *Neil v. Biggers*, 409 U.S. 188, 193, n.3, 93 S. Ct. 375, 379, n.3 (1972) or reverse

"view[s] that the Court of Appeals could properly take of the evidence." *Hunter v. Underwood,* 471 U.S. 222, 232, 105 S. Ct. 1916, 1922 (1985). The District Court and the Court of Appeals properly performed their functions in the intensely factual analysis presented by this case, and did so consistently with the precedents of this Court. Therefore, no purpose would be served by review in this Court.

Respectfully submitted,

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